IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0144
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
CHRISTIAN JAY OGG,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR2001-386

Honorable Robert Duber II, Judge

AFFIRMED

Emily Danies — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 Christian Jay Ogg appeals the trial court's February 2005 order, finding after a violation hearing held in his absence that Ogg had violated various conditions of probation, and the court's February 2006 order revoking probation and sentencing him to a presumptive term of ten years imprisonment for his 2002 conviction for attempted molestation of a child, a class three felony. The court found Ogg had violated the conditions

of his probation as follows: he committed an assault and attempted kidnapping, failed to register as a sex offender in Graham County, failed to enroll in or attend counseling, failed to maintain employment, failed to advise his probation officer of a change in his employment status, moved to a residence that had not been approved by his probation officer, and failed to advise his probation officer of his change of residence.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Ogg has filed a supplemental brief.

¶3 Counsel suggests the trial court's admission of a photographic lineup exhibit at the violation hearing, over Ogg's objection, "may provide the appearance of an arguable issue." The photographic lineup was introduced to establish Ogg had tried to drag a grocery store employee into his car from the store's parking lot and that Ogg had violated the conditions of his probation by committing assault and attempted kidnapping. Ogg's counsel argued at the violation hearing that the photographic lineup "may have been suggestive [because t]here may have been only one Native American in the lineup." Safford police Detective Preston Allred testified that he had investigated the assault and had prepared a photographic lineup using drivers' license photographs. The victim and the store's cashier identified Ogg as the customer without hesitation. Allred did not know the race or nationality of the men depicted in the photographic lineup but testified that they were all of similar appearance and that "[a]ll of them could appear to be of Mexican descent."

¶4 We will not disturb a trial court's decision to admit identification evidence absent an abuse of discretion. *See State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). "A photographic lineup is not unduly suggestive due to subtle differences in the photographs." *State v. Dixon*, 153 Ariz. 151, 154, 735 P.2d 761, 764 (1987). "Lineups need not and usually cannot be ideally constituted. Rather, the law only requires that they depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985) (citations omitted). At the violation hearing, Ogg did not argue that the other men in the photographic lineup did not resemble him, but that the lineup may have been unduly suggestive because Allred could not establish that the other subjects shared Ogg's Native American origins. Each of the subjects appears to have a similar dark complexion, dark hair, and dark eyes, suggesting a basic resemblance to Ogg, and we find no abuse of discretion in admitting the photographic lineup.

¶5 Even if the court had erred in admitting the photographic lineup, we would not reverse. There was other, properly admitted evidence to support the finding that Ogg had committed the offenses and that he had violated the other conditions of probation as alleged. Even in the absence of any finding related to the assault and attempted kidnapping, based on Ogg's repeated failure to comply with critical aspects of his probation, we conclude the trial court would have revoked his probation and sentenced him to the same prison term. *See State v. Ojeda*, 159 Ariz. 560, 561, 769 P.2d 1006, 1007 (1989).

¶6 In his supplemental brief, Ogg challenges the court's imposition of a presumptive prison term of ten years, which was enhanced pursuant to A.R.S. § 13-604.01. Although his brief is not entirely clear, Ogg appears to argue that the legislature usurped the role of the judiciary when it enacted § 13-604.01 and § 13-702 and that these provisions violate his constitutional right to a jury trial.

¶7 Ogg's challenge to the constitutionality of Arizona's sentencing statutes has been rejected by our supreme court. *See State v. Faunt*, 139 Ariz. 111, 113, 677 P.2d 274, 276 (1984). To the extent Ogg's supplemental brief may be read to suggest that a jury must determine whether his offense constituted a dangerous crime against children, subjecting him to the penalty provisions of § 13-604.01, this argument also lacks merit. Ogg plead guilty to attempted molestation of a child, and his plea agreement clearly designates the offense as a dangerous crime against children pursuant to § 13-604.01 and sets forth the range of sentences available. There was no need for any jury finding. And, because Ogg was sentenced to the presumptive term of imprisonment, he was not entitled to have a jury determine any sentencing factors. *See State v. Johnson*, 210 Ariz. 438, ¶ 12, 111 P.3d 1038, 1042 (App. 2005).

¶8 We have reviewed the entire record for fundamental error pursuant to our obligation under *Anders* and have found none. A preponderance of the evidence presented at the violation hearing, viewed in the light most favorable to upholding the trial court's order, *see State v. Rowe*, 116 Ariz. 283, 284, 569 P.2d 225, 226 (1977), established that

Ogg had violated the conditions of probation as alleged in the petition to revoke. *See* Ariz. R. Crim. P. 27.8(b)(3), 17 A.R.S. (allegations in petition to revoke probation must be proved by preponderance of evidence). And, we see no eror, much less fundamental error, related to the sentence.

¶9 Therefore, we affirm.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge